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Nos. 539 and 789.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant,*

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief and Argument of Appellant.

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E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief of Appellant.

Statement.

This suit is a companion of a suit entitled "The Pacific Telephone and Telegraph Company, Appellant, v. E. V. Kuykendall, et al., Appellees, in which

appeals have also been taken to this court and are docketed as cases No. 540 and No. 790. The present appeals are docketed as cases No. 539 and 789.

There are involved in this case two appeals: one, from an order made on April 30, 1923, by Honorable William B. Gilbert, Circuit Judge, and Honorable Edward E. Cushman and Honorable Jeremiah Neterer, District Judges, sitting as a statutory court under section 266 of the Judicial Code, which order denied an application made by The Home Telephone and Telegraph Company of Spokane, appellant here, for an interlocutory injunction restraining the enforcement of a rate order made on March 31, 1923, by the Department of Public Works of Washington; the other, an appeal from a final decree signed by Judge Edward E. Cushman, District Judge, and entered on January 5, 1924, dismissing the complaint of the appellant company.

Inasmuch as the questions involved in these two appeals are substantially the same, it would seem that it would be but an added burden on the court to compel it to read a separate brief in each appeal. We shall, therefore, file but one brief.

A statement of the facts of the controversy follows:

The appellant (hereinafter referred to as the "company") is a corporation organized under the laws of the State of Washington. It is engaged in a general telephone and telegraph business in the City of Spokane and the territory immediately adjacent thereto. The rates it charges for telephone service are subject to regulation by the State of Washington.

On August 8, 1919, the Public Service Commission of that State, now the Department of Public Works (hereinafter referred to as the "department") made an order prescribing the maximum rates to be charged by the company for its service in the Spokane exchange. These rates remained in effect until September 20, 1922, when the company filed a schedule advancing its rates. The state law authorizes the department to suspend rate increases pending an investigation of their reasonableness. (Remington's Compiled Statutes, 1922, Section 10424.) On September 24, 1922, the department issued an order suspending for the full statutory period the operation of these increased rates.

On March 31, 1923, the department made an order—one member, the Supervisor of Public Utilities, dissenting—whereby the application of the

company for increased rates was denied. This order was preceded by a valuation finding made by the department which purported to determine the value of the used and useful property of the company. (Tr. pp. 17 to 24.) Parenthetically, it may be said that the rate order of March 31, 1923, was a joint one in that it prescribed rates for this company and for The Pacific Telephone and Telegraph Company.

The state law authorizes a judicial review of a rate order in the state courts, provided that proceedings for such review are initiated within thirty days after service of the order. (Rem. Comp. Stat., 1922, Sec. 10428.)

The company did not sue out a writ of review within thirty days, nor has it ever brought any proceedings in the state court attacking the order of March 31, 1923.

The company did, however, on April 24, 1923, file a complaint in the United States District Court for the Western District of Washington, Southern Division, over which Judge Cushman presides, in which it alleged, *inter alia*, the filing of the rate schedule of August 8, 1919, the filing of the rate schedule of September 20, 1922, the suspension of

this last mentioned schedule by the department and the making of the order by the department of March 31, 1923.

The company further alleged that the cost of its property in the Spokane exchange was $4,266,899; that said amount was substantially the rate base fixed by the department in its valuation finding of March 31, 1923; that the fair value of its property in the Spokane exchange was $5,710,684; that under the schedule of rates in effect during the year 1922, which schedule was continued in effect by the order of March 31, 1923, the company had earned in 1922 upon the cost of its property 3.07 per cent per annum; that upon the fair value of its property under such schedule it had earned in the same year 2.28 per cent per annum; that if the order of March 31, 1923, was enforced the company would be prevented from earning any return in excess of 1.88 per cent per annum upon the fair value of its property; that had the rates found by the Supervisor of Public Utilities in his dissenting opinion of March 31, 1923, to be just, fair and reasonable rates, been in effect throughout the year 1923, the return to the company upon the fair value of its property would have been 5.52 per cent and

upon the cost of its property 7.64 per cent; that these rates were *less* than just and reasonable rates, but that the company proposed to establish and put into effect such rates pending the final decree in the case.

It prayed, therefore, that the rates prescribed in the order of March 31, 1923, be decreed to be confiscatory, in violation of the Constitution of the United States, and that it be permitted to put in force the schedule of rates found by the dissenting member of the department to be just and reasonable until such time as just and reasonable rates and charges were established according to law. (Transcript, pp. 1 to 8.)

On the same date that the complaint was filed, the company applied to Judge Cushman for a temporary restraining order, which order was granted on that date. A copy of this order appears on page 72 of the printed transcript in case numbered 539 and on the same page in case numbered 789. We may here say that the printed transcript in case numbered 539 is identical with the printed transcript in case numbered 789 for the first 132 pages.

Subpoenas were issued on the same date the restraining order was granted, and served on the defendants named in the complaint, appellees here, on April 25, 1923. Jurisdiction of the United States District Court over the cause had, therefore, fully vested on April 25, 1923.

At this point it may be said that on April 27, 1923, the City of Seattle sued out a writ of review in the Superior Court of Thurston County, claiming that the rates for Seattle fixed by the department's order of March 31, 1923, were excessive. As The Home Telephone and Telegraph Company of Spokane, this appellant, does not operate in Seattle nor at any place other than the City of Spokane and the territory immediately adjacent thereto, it is obvious that the proceeding brought by the City of Seattle cannot, under any possible hypothesis, affect this case.

The application for an interlocutory injunction came on to be heard before Judge Gilbert, Judge Cushman and Judge Neterer on April 30, 1923. At that time the department and the Attorney General filed two motions, one to dismiss the complaint, the other to dissolve the restraining order. (Transcript, p. 104.)

After argument was concluded on April 30th, the statutory court entered an order dissolving the restraining order, denying the interlocutory injunction, and stated that an opinion would be filed later. (Transcript, p. 119.)

The opinion was filed on May 23, 1923. That opinion treated the case brought by this company and the case brought by The Pacific Telephone and Telegraph Company as a consolidated cause.

The opinion states, in substance, that the proceeding instituted by the City of Seattle in the Thurston County court was not one brought to enforce the order of the department of March 31st, and therefore does not fall within the amendment to section 266 of the Judicial Code; that there was no need for the company to apply to the department for a rehearing of the rate order before it brought the suit in the United States District Court; that under the statutes of the State of Washington the courts of that State in reviewing a *rate* order, act in a *judicial* capacity because the state courts are given no power by the section of the statute relating to the review of a rate order to make their own findings or fix rates, and, consequently, so far as the rate order of March

31, 1923, was concerned, the suit in the United States District Court was not prematurely brought.

It states further, however, that the complaint filed in the United States District Court shows that there is a controversy as to the value of the property of the company; that under the statutes of the State of Washington (Rem. Comp. Stat., 1922, Sec. 10441) the Superior Courts and Supreme Court of that State "have *legislative* authority in determining the rate base superior to that of the department," and that " 'considerations of comity and convenience' require the court to hold that until plaintiffs have exhausted their right to relief in the Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed." (Transcript, p. 131.)

The statutory court further held that if the company initiated a review proceeding in the state court and applied in that proceeding for a stay of the enforcement of the order of March 31st, and also applied for a stay in the proceeding brought by the City of Seattle in the Thurston County court, and such applications for stay were denied by the Superior Courts of the State of Washington and such denials affirmed by the state Supreme Court,

then the company might renew its application in the United States Court for an interlocutory injunction. (Transcript, p. 132.)

It is at once apparent that the statutory court considered that the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, was controlling.

An appeal was taken by the company from the order of the statutory court denying the interlocutory injunction, and the same was docketed in this court as cause No. 539.

On July 5, 1923, the company filed a motion in the United States District Court for the Western District of Washington, Southern Division, for an order requiring the defendants named in the complaint, appellees here, to file forthwith, an answer to the complaint, or in default thereof that a decree *pro confesso* be entered against said defendants.

As hereinbefore stated, the appellees had on April 30, 1923, filed, among other motions, a motion to dismiss the complaint, on the ground that there was a want of equity in the complaint. No argument had ever been had up to that time on the motion to dismiss.

On July 9, 1923, after argument, the District Judge declined to consider or pass upon the motion

to dismiss the complaint, and denied the motion to require the appellees to answer, specifically basing his ruling in both instances upon the reasons set forth in the opinion rendered by the statutory court and filed on May 23, 1923.

On August 2, 1923, The Pacific Telephone and Telegraph Company sued out in the Circuit Court of Appeals for the Ninth Circuit a rule to show cause why the District Court should not proceed in the case brought by the Pacific Company. That case was heard by the Circuit Court of Appeals on September 18, 1923. On October 7, 1923, the case was decided by the Circuit Court of Appeals in favor of the Pacific Company, and a writ of mandamus was issued by that court commanding the District Court to proceed forthwith in the suit brought by the Pacific Company. (The opinion of the Circuit Court is reported in 292 Federal, at page 930.)

In view of the fact that the defendants in the suit brought by the Pacific Company and the defendants in the suit brought by this company were the same, that the ruling and order made by the District Judge in the case brought by the Pacific Company and the ruling and order made by the District Judge in this case are identical except for

the names of the plaintiffs, and that the issues involved in the two suits were the same, it was not deemed necessary that this company should make an application for a writ of mandamus.

The District Court, upon receipt of the mandate, vacated the order of July 9, 1923, made in this case and assigned October 29, 1923, as the date for argument on the motion to dismiss the complaint.

For various reasons not necessary now to mention, argument on the motion to dismiss was not had until December 31, 1923. On that date, after argument, the District Judge, Honorable Edward E. Cushman, granted the motion to dismiss the complaint of the company on the ground, primarily, that the suit had been prematurely brought by reason of the failure of the company to exhaust its alleged right to relief in the Superior Courts and Supreme Court of the State of Washington.

A formal decree dismissing the complaint was signed by the District Judge and filed on January 5, 1924. Thereupon, an appeal was taken from that decree to this court and is docketed herein as cause No. 789.

Assignment of Errors.

There is some slight difference between the Assignment of Errors in case No. 539 and case No. 789, but the difference arises solely from the character of the action complained of. For convenience sake, however, all Assignment of Errors in both appeals may be summarized and grouped as follows:

I.

The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

II.

Legislative power cannot constitutionally be vested in Washington state courts.

III.

The Washington state law expressly forbids a stay.

IV.

Wholly apart from constitutional questions, the legislative process in this case was complete prior

to the filing of the complaint in the United States Court.

V.

The complaint states a cause of action for injunctive relief.

Argument.

It is apparent that both the statutory court and the District Judge thought that this case was controlled by the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

It was held in that case that where the reduced rates had not taken effect and probably would not take effect until the Supreme Court of Appeals of Virginia could, on appeal from the order of the Virginia Commission, perform the legislative function, constitutionally vested in the court, of finally fixing rates "considerations of comity and convenience" required that the railroad companies should delay their application for relief to the United States courts until the legislative issues raised by the appeals were denied, or it became reasonably certain in some other way, as by dismissal of the appeals, that the prescribed rates would be put into operation.

In that case legislative power has been imposed by the Constitution of Virginia upon its state courts, and the order of the regulatory body was therefore not the final legislative act.

Again, in that case the property of the railroad company had not, at the time of the application to the United States court, been confiscated and its property would be confiscated only in the event that the reduced rates were finally put into operation. That case is not applicable to the facts in the case at bar for several reasons:

1. The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

2. Legislative power cannot constitutionally be vested in the Washington state courts.

3. The Washington state law expressly forbids a stay.

4. Wholly apart from constitutional questions, the legislative process in this case was complete prior to the filing of the complaint in the United States court.

I.

THE JUDICIAL STAGE IS REACHED WHENEVER JUDICIAL INTERVENTION IS NECESSARY TO OBTAIN RELIEF FROM CONFISCATORY RATES ORDERED BY A REGULATORY BODY.

The *Prentis* case is based upon "considerations of comity and convenience." In that case there had been no present invasion upon the rights of the railroad companies. They had not lost a single dollar. In the case at bar, however, the company is now and has been suffering daily from confiscation under the rate to which it is now limited. Its constitutional rights have been invaded. "Rules of comity and convenience must give way to constitutional rights."

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is directly in point. The Constitution of Oklahoma, like that of Virginia, confers legislative power upon the courts. In that case there had been no final decision of the Supreme Court of that State which was the last legislative tribunal. This court held, however, that inasmuch as the utility was suffering daily from confiscation under the rate to which it was limited, the

statutory court should have heard the application for an interlocutory injunction upon the merits.

In support of this conclusion, this court cites *Love v. Atchison, Topeka & Santa Fe Ry. Co.*, 185 Fed. 321, which states very clearly the reasons supporting court intervention pending the completion of the legislative process. We quote from the *Love* case, page 327:

"The legislative function in rate-making looks to the future and determines what future rates shall be. But when rates, either tentative or final have been put and are maintained in actual operation under penalty of severe fines, the question whether or not their effect is to take the property of the railroad companies affected thereby without just compensation is a judicial one, conditioned by past or present facts, and the national courts cannot be deprived of jurisdiction of it by the fact that the process of making the tentative rates is yet incomplete. It is as clear a violation of the Constitution, and one as promptly remediable in the national courts, to take the property of a railroad company without just compensation by the enforced operation of tentative rates during the process of their making as by the operation of final rates after that process is complete. Railroad companies that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the rate-making process by provisions of a state Constitution or of a state law, or by orders of a

state commission, prescribing tentative rates and putting them in effect during the rate-making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate-making process to the same extent that they may after the process is completed. These suits were not prematurely brought."

The same question was again before this court in *Prendergast v. New York Telephone Co.*, 262 U. S. 43, where this court followed and cited with approval *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, and *Love v. Atchison, Topeka & Santa Fe Ry. C.*, 185 Fed. 321, and concluded as follows: "Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined *pending the continuance and completion of the rate making process.*" (Italics ours.)

We say again that there has been a present invasion of our constitutional rights, and that judicial intervention is necessary to obtain relief from such invasion. If judicial intervention is necessary to obtain relief, it is clear that the judicial stage is reached.

Where a utility is daily suffering confiscation it is not necessary that the legislative process be complete before a resort is had to the United States Courts.

The only distinction ever sought to be drawn by appellees between the case at bar and the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is that in the Oklahoma case an application was made to the Supreme Court of that State for a stay and such application denied. In fact, however, no such distinction exists, because, as we shall show later, the law of the State of Washington expressly forbids the courts of that State from granting a stay.

II.

LEGISLATIVE POWER CANNOT CONSTITUTIONALLY BE VESTED IN WASHINGTON STATE COURTS.

The statutory court in denying the interlocutory injunction and the District Court in dismissing the complaint did not hold that the state courts possessed legislative power in respect to the rate order of the department. The statutory court and the District Court based their action solely upon the fact that section 10441 of Rem. Comp. Stat., 1922, of Washington, imposes upon the state courts of Washington the *legislative* authority of determining the value of the property of public service companies operating in that state.

An examination of the Washington law is necessary. In the case of an order affecting *rates*, the statute provides for a *judicial* review of such order by the state courts. This is clear from the provisions of section 10428 of Rem. Comp. Stat. of Washington, 1922. That section provides that any complainant or public service company affected by a rate order may, within thirty days after the making of the order, sue out a writ of review in one of the superior courts of the State of Washington. It further provides for a hearing before such court and that "upon such hearing the superior court shall render judgment either affirming or setting aside the order of the commission under review."

Similar provisions are found in the regulatory acts of a majority of the states.

But an entirely different situation is presented when the provisions of the Washington statute relative to the determination of value are considered.

Section 10441 of Rem. Comp. Stat., 1922, directs the regulatory body to ascertain, as early as practicable, the value of every public service company subject to its jurisdiction. It then provides for a hearing at which the utility affected may be heard,

and for the making of findings of fact by the regulatory body, which findings shall cover in detail all matters which the legislature deemed material to the determination of value.

This valuation proceeding is independent of rate controversies.

The statute further provides that the utility, and the utility alone, may institute a suit in one of the superior courts of the State of Washington for the purpose of having the findings of the regulatory body reviewed, and that in case the Superior Court to which appeal has been made

"finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful, or not supported by the evidence [the court] *shall make new and correct findings* to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

The statute also provides that an appeal may be taken from the judgment of the Superior Court to the Supreme Court, and that

"in case the supreme court finds any findings so

sought to be reviewed unjust, incorrect, unlawful, or unreasonable, or not supported by the evidence, *it shall either make and render proper findings* or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

Further,

"the findings . . . . . shall be admissible in evidence in any action, proceeding or hearing . . . . . and such findings, when so introduced, shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing . . . . ."

(For the convenience of the court we set out in full sections 10428 and 10441 as an appendix to this brief.)

Now we concede that the review provided for in section 10441 is not a judicial review, and that this section is similar to paragraphs 6, 7 and 8 and the first sentence of paragraph 64 of the Public Utilities Act of the District of Columbia, and which sections of said Act were considered by this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428.

It was held in that case, among other things, that the act of Congress attempted to confer upon this court the power to make the order the Commission should have made, and that such power was legislative power.

In the case at bar it is clear that the legislature of the State of Washington has attempted to confer a like power upon the courts of that State.

But the question here for solution is, Could the legislature, under the Constitution of that State, vest legislative power in the courts?

There is no provision in the Constitution of the State of Washington similar or analogous to the provision in the Constitution of Virginia discussed in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

On the contrary, the provisions of the Constitution of the State of Washington relative to the vesting of powers are almost identical with the provisions in that regard of the Constitution of the United States.

In the absence, therefore, of some declaration to the contrary by the Supreme Court of the State of Washington, the decision of this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428, is controlling.

The doctrine therein announced is supported by an almost unbroken line of authority starting at the very beginning of this Republic and extending to the present date. In confirmation of this statement, we cite the following cases:

Hayburn's Case, 2 Dall. 409, and note at p. 410;

The Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930;

Kilbourn v. Thompson, 103 U. S. 168, 190;

United States v. Ferreira, 13 How. 40, and note;

Helena Water Co. v. City of Helena, 277 Fed. 66, 68;

Oregon R. & Navigation Co. v. Campbell, et al, 173 Fed. 957;

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Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 508;

City of Zanesville v. Telephone Co., 63 Ohio St. 442;

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DeChastellux v. Fairchild, 3 Harris 18;

Buck's County Prison Board, 28 Pa. Co. Ct. 65,70;

Glaspell v. City of Jamestown, 11 N. D. 86;

Steenerson v. Great Northern Ry. Co., 69 Minn. 353;

State v. Great Northern Ry. Co., 130 Minn. 57;

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Norwalk St. Ry. Company's Appeal, 69 Conn. 576;

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State Racing Commission v. Latona Agricultural Assn., 136 Ky. 173;

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But we are not without clear decisions of the Supreme Court of the State of Washington holding that the legislature cannot impose legislative functions upon the courts of that State.

In *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 110, the court said:

"We hold that a *judicial* court *cannot* exercise legislative functions and that the *legislature cannot impose such power upon it.*"

In *State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 500, the court said:

"Manifestly, it is wholly impractical and *beyond the proper sphere* of the courts to assume to control in any degree this purely nonjudicial duty of the commission. Any attempt on the part of the courts

to do so would, it seems clear to us, be to enter the field of executive and administrative duties. *Such would be clearly subversive of our theory of government.*" (Italics ours.)

We quote from *In re Bruen*, 102 Wash. 472, at page 478:

"These functions being essentially judicial and inherent in the courts, we are of the opinion that the legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The legislative, executive, and judicial functions have been carefully *separated* and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts." (Italics ours.)

See also:

Spokane v. Spokane and Inland Empire R. Co., 75 Wash. 651; 659;

Selde v. Lincoln County, 25 Wash. 198, 206;

Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930.

Since, as we have shown, legislative power cannot constitutionally be conferred upon the state courts of Washington, it is obvious that the legislative process terminated upon the making of the rate order of March 31, 1923.

III.

THE WASHINGTON STATE LAW FORBIDS A STAY.

It will undoubtedly be claimed that the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is not applicable because of the failure of the company to seek a stay of the rate order in the Washington state courts. But that case is not so distinguishable. As already stated, it would be useless for the company to ask either the Superior Court of Thurston County or the Supreme Court of the State of Washington to stay the enforcement of the order of March 31, 1923, because the state courts are expressly prohibited by statute from staying the enforcement of that order.

Section 10424, Rem. Comp. Stat., 1922, relating to the filing of tariffs increasing rates and providing for a hearing on such proposed increase and

the suspension of the schedule pending the hearing, declares that:

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

It is not open to question that this provision is plain, direct, positive and unambiguous.

Moreover, the granting of a stay is expressly prohibited by another provision of the Washington law. The rates approved by the department in its order of March 31, 1923, had been put in effect originally on August 1, 1919. The rates, therefore, on March 31, 1923, had been in effect *for more than one year.* On October 5, 1922, the company filed a schedule advancing the rates for telephone service in the cities of Seattle and Tacoma, and toll rates throughout the State. Section 10429, Rem. Comp. Stat., 1922, provides that:

"when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed

in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court, by such supreme court."

It is manifest, therefore, that even though the company had instituted review proceedings in the Superior Court of Thurston County and had applied in that proceeding and also in the proceeding brought by the City of Seattle in the Thurston County court for a stay, neither that court nor the state Supreme Court could have granted any relief to the company until after the final decision of the case upon its merits by the Supreme Court.

We again say that we have never been able to conceive of any theory by which this company, which operates in Spokane only, could apply in the suit brought by the City of Seattle in the Thurston County court, which suit relates solely to the rates charged in Seattle, for a stay or relief of any kind.

Since any application to the state court for a stay would not only have been futile, but also one which the company had not the legal right to make, the company should not have been required to make it as a condition precedent to its resort to the United States Court.

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is, therefore, not distinguishable from the case at bar, and the following language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is apposite:

"Again, if the petitioner was denied a supersedeas by the state or by the state courts, the rule announced in the Oklahoma Gas Co. Case applies, and in this connection it is immaterial whether the supersedeas was denied by the court or by the supreme legislative authority of the state."

As indicated in the opinion of the Circuit Court of Appeals in the case of *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, appellees have heretofore sought to escape the plain provisions of sections 10424 and 10429, Rem. Comp. Stat., 1922, by asserting (a) that such provisions are unconstitutional, and (b) that the state courts of Washington have inherent power to grant a stay. These contentions merit but little consideration.

No reason has ever been assigned why the statutes in question should be held to be unconstitutional. We can conceive of no reason why the statutes should be held invalid. Moreover, how can the question as to whether the statutes are valid

or not arise? We believe that the statutes absolutely deprive the state courts of the power to grant a stay, and that the statutes are valid. On what theory then can we ask the state courts for a stay? Are we to go into a court of justice and ask the court to grant to us a relief which we firmly believe the court has not the power to give?

With reference to the argument that the state courts have inherent power to grant a stay despite the express and positive provisions of the statutes to the contrary, we say that the state courts acting in a *legislative* capacity have no such power. Hence, if the state courts do have inherent power to grant such a stay, they have it wholly in the exercise of their general judicial power. But we may not safely apply to the state courts acting in a purely judicial capacity for relief. (*Detroit & Mackinac Ry. Co. v. Michigan R. R. Commission*, 235 U. S. 402.)

Moreover, appellees cannot assert that the state courts could in this case act in a judicial capacity, for the entire basis of their defense is that the court is acting in a legislative capacity.

Again the language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is pertinent.

"But it has been mildly suggested that this provision of the law may be declared unconstitutional by the Supreme Court of the state, or that the courts of the state might grant a supersedeas, notwithstanding the prohibition contained in the statute. We are not permitted to indulge in any such speculation where important constitutional rights are involved. No ground of unconstitutionality has been suggested; the presumption is to the contrary, and in this case we think the presumption accords with the fact. In the exercise of appellate jurisdiction conferred by the Constitution, it may be that the Supreme Court of the state has inherent power to grant a supersedeas to the end that its appellate jurisdiction may not be defeated; but however that may be, where, as here, the appeal is wholly statutory, jurisdiction may be conferred or withheld at the pleasure of the Legislature."

IV.

WHOLLY APART FROM CONSTITUTIONAL QUESTIONS, THE LEGISLATIVE PROCESS IN THIS CASE WAS COMPLETE PRIOR TO THE FILING OF THE COMPLAINT IN THE UNITED STATES COURT.

(1) As already stated, section 10441 Rem. Comp. Stat., 1922, provides for a general investigation and the making of findings concerning matters material to the determination of the valuation of a public utility. These findings may be reviewed

and corrected by the courts, and as made or corrected "when properly certified under the seal of the commission" are "admissible in evidence in any action, proceeding or hearing," and are "conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing."

But if we assume, for the sake of the argument only, (a) that legislative power may be imposed upon courts in the State of Washington, and (b) that the valuation findings are now subject to review in the state courts, nevertheless a review of such findings at this time would not affect the rate order of March 31, 1923, which became final, so far as resort to the state courts was concerned, by the failure to review that order within the thirty day period provided by the state statute.

The rule that the rate making process may become final so as to permit resort to the United States courts *by the failure of the utility to invoke the action of the final state legislative authority* under the provisions of the state law, is recognized in the *Prentis* case. The court there declined to proceed until the final action of the legislative

authority of the State, namely, the Supreme Court of Appeals of Virginia. Attention was directed, however, to the provisions of the Virginia law requiring appeals to be taken within six months from the date of the order of the primary regulatory body, and to the fact that it might be found in that case that it was too late to appeal. The court, in consequence, declined to dismiss the bills, holding that they should be retained to await the result of the appeals, "if the companies see fit to take them," and that "if the appeals are dismissed as brought too late, the companies will be entitled to decrees."

In the case now before the court, the company did not within thirty days sue out, nor has it ever sued out a writ to review the order of March 31, 1923. The time within which such proceedings might have been begun expired on April 30, 1923, the day on which the application for an interlocutory injunction was argued. It is manifest that under the provisions of the state law, the company cannot now institute any proceeding in the state court by which it might obtain relief.

Conceding, therefore, for the moment that in respect to valuation findings the state courts of Washington do possess legislative power, nevertheless the proceedings in this case have reached the

judicial stage within the rule announced in the *Prentis* case.

(2) Again, assuming for the sake of argument only, that legislative power may be imposed upon the state courts of Washington, nevertheless in deciding whether in any particular controversy the court is acting judicially or non-judicially, the test to be applied is that "The nature of the final act determines the nature of the previous inquiry." (*Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 227.)

If a regulatory body is empowered to determine value in the exercise and aid of its general authority, independent of a rate proceeding, then the action of a reviewing court, having the power to substitute a different value, is legislative. But if a court is reviewing the valuation in a rate case in order to determine whether the rates prescribed by the regulatory body are confiscatory or not, the action of the reviewing court is judicial, unless it has authority to substitute other rates for those found by the regulatory body which authority the courts of the State of Washington clearly do not have.

In the case at bar, the order of March 31st establishes certain rates. If that order was reviewed in the state courts, those courts could not fix a new rate. The sole act which that court could perform would necessarily be judicial. The judicial stage, therefore, having been reached resort might be had to the United States court.

V.

THE COMPLAINT STATES A CAUSE OF ACTION FOR INJUNCTIVE RELIEF.

Some contention was made at the time of the argument on the motion to dismiss that the complaint in this case did not state a cause of action because its averments were averments of conclusions of law rather than averments of fact. A comparison of the allegations of this complaint with the allegations contained in the complaint in the case of *Prendergast v. New York Telephone Co.*, 262 U. S. 43, will show that if the averments in this complaint are averments of conclusions of law, the same is equally true of the averments in the complaint in the *Prendergast* case.

This court, however, said of the allegations in the complaint in the *Prendergast* case, that the

complaint "aptly stated the ultimate facts upon which the company asked relief omitting any mere statements of evidence."

Conclusion.

It is pointed out in our brief opposing the motion to dismiss the appeal from the order of the statutory court denying an interlocutory injunction, that if that particular appeal is dismissed the question of whether or not the statutory court should have considered our application for an interlocutory injunction on the merits should be considered on this appeal.

In any event, all we seek by these appeals is an opportunity to have the case considered on its merits. So far we have been denied that opportunity, and the denial has been based upon the ground that the legislative process of determining the value of our property is not complete, and that there is a possibility that the state courts of Washington, if applied to, will stay the enforcement of the rate order which deprives us of our property. But the answer to these assertions of fact and possibility is clear and complete. It is not necessary

for a utility which is daily suffering confiscation to await the termination of the legislative process of rate making, much less that of the process of determining value, before it may invoke the aid and power of a United States court. Again, the legislative process was at an end on March 31, 1923, because (a) the statute which attempts to impose a legislative duty upon the state courts of Washington is absolutely void, and (b) the rate order of March 31, 1923, which deprives us of our property, has never been reviewed and cannot now be reviewed in the state courts. Moreover, even if that order could now be reviewed its enforcement could not, by virtue of positive and express provisions of the statutes of the State of Washington, be stayed by the courts of that state.

We, therefore, respectfully submit that the order of the statutory court entered on April 30, 1923, and the decree of dismissal signed on January 5, 1924, by the District Judge are erroneous and should be reversed.

Respectfully submitted,

OTTO B. RUPP,
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C. M. BRACELEN,
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Of Counsel.

Appendix.

SECTION 10428 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Any complainant or any public service company affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under

review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.

SECTION 10441 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Valuation of Property—Procedure.

The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company.

It shall also ascertain in the case of companies engaged in interstate business, the relative value of the use to which such property in this state is actually put in the conduct of interstate business and state business respectively.

It shall also ascertain the total market value of the property of each public service company operating in this state used for the public convenience within the state.

It shall also ascertain the time intervening between the expenditure of money in the cost of construction and time when returns in the shape of dividends were first received by each of these companies.

It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses, and in case of a company doing interstate business it shall also ascertain the probable earning capacity of such company upon intrastate business, and the sum required to meet fixed charges and operating

expenses on intrastate business, and the relative proportion of intrastate and interstate business, the relative proportion of the operating expenses connected therewith, the relative proportion of the revenue which should be derived therefrom.

It shall also ascertain the density of traffic and of population tributary to every public service company, and the conditions which will tend to show whether such traffic and population is likely to continue, increase or diminish.

It shall also ascertain the existence of grades, curvatures and other physical conditions affecting the movement of traffic and business of common carriers.

It shall also ascertain whether the expenditures already made by any public service company in procuring its property were such as were justified by the then existing conditions, and such as might reasonably be expected in the immediate future and whether the money expended by such company has been reasonable for the present needs of the company and for such needs as may reasonably be expected in the immediate future.

The commission is hereby authorized to cause a hearing or hearings to be held at such time or times

and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the State of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the State of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act

or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, and the value of the property of such company in the state used for the public convenience

of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings: Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing.

FILED
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WM. R. STANS
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Nos. 539 and 789.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington; HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND DISMISSING THE BILL.

Brief and Argument of Alex M. Winston of Counsel for Appellees.

ALEX M. WINSTON,
Of Counsel.

JOHN H. DUNBAR,
Attorney General of Washington,
Solicitor for Appellees.

SHAW & BORDEN CO. 208269

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There is no confiscation herein because the rates complained of are in accordance with a contract between appellant and the City of Spokane

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APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND DISCUSSING THE BILL.

Brief and Argument of Alex M. Winston of Counsel for Appellees.

Foreword.

This brief does not deal with the question as to whether the statutory court was correct in the reasons given by it for denying an interlocutory injunction. It

is based solely upon the assumption that the appellant is bound by the terms of a franchise contract now existing between it and the City of Spokane for the furnishing of telephone service.

Statement of the Case.

At the time of the hearing upon the application of appellant for an interlocutory injunction, there was filed an affidavit of Alex M. Winston to the effect that appellant is operating under a franchise granted to it by the City of Spokane, and accepted by it, under the terms of which it contracts to furnish business telephones at a charge not to exceed $8.00 per month, and residence telephones at a charge not to exceed $2.00 per month. The affidavit further stated that the franchise ordinance had been adjudicated by the Supreme Court of the State of Washington to constitute a valid contract between the appellant and the City of Spokane and its inhabitants, save as it might be terminated by the Public Service Commission of Washington, the predecessor in duties of the Department of Public Works of Washington; and that the said contract has never been terminated by it, save by an order permitting the putting into effect of certain rates specified in exhibit "A" attached to the bill of complaint. The rates therein referred to were $7.50 per month for business telephones, wall sets, and $7.75 per month for business telephones, desk sets, and were $3.25 per month for residence telephones, wall sets, and

$3.50 per month for residence telephones, desk sets. (Transcript Tr. No. 539 p. 8).

The appellant filed an affidavit of C. E. Flaeger in reply to the affidavit of Alex M. Winston, but the allegations of Mr. Winston's affidavit hereinbefore set forth were not denied.

The bill of complaint herein seeks to enjoin the appellees from preventing appellant putting into force rates in Spokane lower than the following:

Business Telephones per month:

Wall Sets	$8.50
Desk Sets	8.75

Residence Telephones per month:

Wall Sets	3.75
Desk Sets	4.00

(Transcript Tr. No. 539 p. 69).

Appellees' Contention Herein.

A contract exists between appellant and the City of Spokane for the furnishing of telephone service at the rates complained of.

Argument.

It will be seen that appellant's position in this cause is that the rates permitted to be charged by the Depart-

ment of Public Works and its predecessor, though in excess of those contracted for in the franchise, are confiscatory; and appellant seeks to still further increase these charges without the consent of the Department.

This action is based solely upon the theory that the existing rates are confiscatory and within the prohibition of the constitution. It is manifest that unless there be confiscatory legislation the lower court had no jurisdiction, and that the application for an interlocutory injunction was rightfully denied. This calls for the determination of the question of whether there is now in existence a legal franchise contract between the appellant and the City of Spokane.

We are well aware of the rule laid down by this court in *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290-293, that this court will not ordinarily pass upon questions that should have been passed upon by the lower court. Therefore, if it were a question of passing upon the conflicting affidavits that were before the lower court as to the merits of the bill in relation to valuation, earnings, and the like, this brief would not have been written. The rule in question, however, is not one of universal application in every instance. In fact, in the *Russell* case this court said "generally it is not desirable that we should pass upon such matters until they have been dealt with below." In the case at bar, however, the question herein presented by us goes to the question of jurisdiction. If this court should agree with us in our conten-

tion, this case, of necessity, is at an end. Such decision would prevent any further litigation and remit the appellant to such remedy as it may have been before the Department of Public Works of the State of Washington, and the courts of that state. If we are not right in our contention that the original franchise contract is valid and still in effect, save as modified by the order of the Department of Public Works, then this court will so hold, it being immaterial whether the decision of the lower court, upon the grounds set forth in it, was right or wrong. *McCluny v. Silliman*, 6 *Wheat.* 598. *Pennsylvania Ry. Co. v. Wabash, etc., Co.*, 157 *U. S.* 225.

It has been adjudicated that the rate provisions of the ordinance under which appellant is operating in the City of Spokane constituted a valid contract, save as they might be modified by order of the predecessor of the Department. *State ex rel Ellertsen v. Home Telephone and Telegraph Co.*, 102 *Wash.* 196.

If, therefore, the contract is in existence, save as modified by the Department of Public Works, there is no confiscation. *Columbus Railway Power & Light Co. v. City of Columbus, Ohio*, 249 *U. S.* 399.

It will be observed that in the Ellertsen case the Supreme Court of Washington, after holding that the rate provision of the franchise ordinance in question was valid, next proceeded to determine the effect of section 43 of the Public Service Commission Laws of the State

of Washington, Laws of 1911, page 567, which is as follows:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules or rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company *as and when* directed by such order." (Italics of course ours).

Our contention is that the proper construction of this statute is that when the Commission permitted the appellant to depart from its contract with the City of Spokane, it simply modified the contract and that, as modified, it is still in full force and effect. In any event, we contend that if, as is held in the *Ellertsen* case, the state, acting under its superior authority, may set aside or modify the rate provisions of the franchise contract, there would be written into the contract, as a matter of law, the right of the state to modify it.

The Public Service Commission Law of the State of Washington vests the primary power to fix rates to be charged by public utilities in the Department of Public Works. From its orders parties deeming themselves ag-

grieved may have recourse to the courts. The material provisions of the law are set forth in an appendix to this brief, and the substance of them are as follows:

Section 10372 of Remington's Compiled Statutes of Washington provides for the filing by every telephone company with the Commission, and keeping open to public inspection, schedules showing its rates. Section 10373 of the same code provides that no change shall be made by any telephone company in any rate so published and filed, except after notice to the department and publication of the proposed new schedule. Section 10376 of the same code prohibits the departure by a telephone company from the rates so filed and published. Section 10379 of the code, being the section in controversy herein, has been set forth in this brief. Section 10422 of the same code provides for the making of complaints against unreasonable rates. Section 10423 of the same code provides for the hearing upon such complaint and the making of an order thereon. Section 10426 of the same code provides that when the Department finds that any rate is sufficient it may order that the rate be not changed, and further provides that such rate shall not be changed without the consent of the Department. Section 10428 of the same code provides for a review in the courts of any order of the Department.

It is a cardinal principal of statutory construction that the courts will, if possible, give effect to every word in a statute. *Lawrence v. Allen, 7 How.*, 785; *Bend v. Hoyt,*

13 *Peters*, 263; *Montclair Twp. v. Ramsdell*, 107 *U. S.* 147, and that a single word in the statute having a meaning must not be disregarded. *Post Master General of the U. S. v. Early*, 12 *Wheat*, 136. How, then, should the statute be construed? It is evident that when the Commission acted and directed the appellant to deviate from the schedule prescribed in its franchise contract, the contract either became at an end or it continued in existence, save as modified by the order of the Commission. What did the law makers of the State of Washington intend? If they intended that the contract should be terminated for all purposes for all time, then the words "as and when" need not have been inserted in the act. The act would have simply provided that the contract should be terminated "when" directed by the Commission. In other words, such a construction gives no effect to the word "as". It becomes superfluous, and must be disregarded, which this court says can not be done. It seems, therefore, to us that by the use of the term "as and when" it was the intention of the Washington legislature to say that the existing contract should be terminated in the manner and when directed by the Commission. So we see that the termination of the contract was by the substitution of the rates by the Commission directed to be thereafter charged by the utility.

A unique situation is presented in this case. It is not the ordinary case where a state, or one of its municipal subdivisions, attempts to impose, by force, confiscatory rates upon a utility. It is a case where a utility and a

community have agreed that, in consideration of the granting by the community to the utility, of a franchise, asked for and accepted by the utility, the utility is to furnish service at not to exceed certain rates specified in the franchise. The complaint of the utility in this case, in brief, is that the Department has not proceeded as far in removing alleged burdensome franchise obligations from the utility, as, in the judgment of the utility, it should have done. The utility in this case sought the aid of the Department's predecessor to relieve it from what, in late years, have proven to be alleged burdensome provisions of its contract. Had the Commission declined to act, the utility was helpless. The utility in one breath calls upon the state for relief, and in the next, by the bringing of the present action, accuses it of confiscation. We do not believe that the constitutional provision applies to cases like this.

If we be wrong in the foregoing premise, the appellant is in no better case. The contract in question being valid, and being subject to modification by the action of the Department, the parties thereto must be presumed to have contracted in reference to the power of the state to modify the contract. That being so, the contract must still remain in existence, the utility being a party on the one hand and the state a party on the other. So that, under the spirit, and we say the letter, of the law in question, properly construed, it follows that if the contract does not now exist between the original parties, save as modified, it does now exist between the utility on

the one hand and the State, on behalf of the citizens of Spokane, on the other. This action, therefore, can not be maintained.

For the reasons given, we believe that the order appealed from should be affirmed.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of Washington,
Solicitor for Appellees,

ALEX M. WINSTON,
Of Counsel for Appellees.

Appendix.

SECTION 10372 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Tariff Schedule—Publication

Every telephone and telegraph company shall file with the commission and shall print and keep open to public inspection at such points as the commission may designate, schedules showing the rates, tolls, rentals, contracts and charges of such companies for messages, conversations and services rendered and equipment and facilities supplied for messages and services to be performed within the state between each point upon its line and all other points thereon, and between each point upon its line and all points upon every other similar line operated or controlled by it, and between each point on its line or upon any line leased, operated or controlled by it and all points upon the line of any other similar company, whenever a through service and joint rate shall have been established or ordered between any two such points. If no joint rate covering a through service has been established, the several companies in such through service shall file, print and keep open to public inspection as aforesaid the separately established rates, tolls, rentals, contracts and charges applicable for such through service. The schedules printed as aforesaid shall plainly state the places between which telephone or telegraph service, or both, will be rendered, and shall also state separately all

charges and all privileges or facilities granted or allowed, and any rules or regulations or forms of contract which may in any wise change, affect or determine any of the aggregate of the rates, tolls, rentals or charges for the service rendered. A schedule shall be plainly printed in large type, and a copy thereof shall be kept by every telephone company and telegraph company readily accessible to and for convenient inspection by the public at such places as may be designated by the commission, which schedule shall state the rates charged from such station to every other station on such company's line, or on any line controlled and used by it within the state. All or any of such schedules kept as aforesaid shall be immediately produced by such telephone company or telegraph company upon the demand of any person. A notice printed in bold type, and stating that such schedules are on file and open to inspection by any person, the places where the same are kept, and that the agent will assist such person to determine from such schedules any rate, toll, rental, rule or regulation which is in force shall be kept posted by every telephone company and telegraph company in a conspicuous place in every station or office of such company.

SECTION 10373 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Changes in Schedules.

Unless the commission otherwise orders, no change shall be made in any rate, toll, rental, contract or charge, which shall have been filed and published by any telephone or telegraph company in compliance with the requirements of the preceding section, except after thirty days' notice to the commission and publication for thirty days as required in the case of original schedules in the preceding section, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, toll, contract or charge will go into effect, and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission for good cause shown may allow changes in rates, charges, tolls, rentals or contracts without requiring the thirty days' notice and publication herein provided for, by an order specifying the change so to be made and the time when it shall take effect, and the manner in which the same shall be filed and published. When any change is made in any rate, toll, contract, rental or charge, the effect of which is to increase any rate, toll, rental or charge then existing, attention shall be directed on the copy filed with the commission to such increase by some character immediately preceding or

following the item in such schedule, which character shall be in such form as the commission may designate.

SECTION 10376 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Schedule Rate to be Charged—Exceptions.

No telephone or telegraph company shall charge, demand, collect or receive different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect at that time, nor shall any telephone company or telegraph company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are specified in its schedule filed and in effect at the time, and regularly and uniformly extended to all persons and corporations under like circumstances for like or substantially similar service.

No telephone company or telegraph company subject to the provisions of this act shall, directly or indirectly, give any free or reduced service or any free pass or frank for the transmission of messages by either telephone or telegraph between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys at law, and their families and persons and corporations exclusively engaged in charitable and eleemosynary work, and ministers of

religion, Young Men's Christian Associations, Young Women's Christian Associations; to indigent and destitute persons, and to officers and employees of other telephone companies, telegraph companies, railroad companies and street railroad companies.

SECTION 10379 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Existing Contracts—Effect.

Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order.

SECTION 10422 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Complaints.

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of

commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: Provided, that no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service: Provided, further, that when two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission

shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: Provided, all grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a

notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not otherwise provided for in this act may be prescribed by the commission.

SECTION 10423 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Hearings, Orders and Record.

At the time fixed for the hearing mentioned in the preceding section, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or it may desire. The commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. Where an order cannot, in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on

application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record of all proceedings had before the commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings in the cause, shall constitute the record of the commission.

SECTION 10426 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Remunerative Charges cannot be Changed.

Whenever the commission shall find, after hearing had upon its own motion or upon complaint as herein provided, that any rate, toll, rental or charge which has been the subject of complaint and inquiry is sufficiently remunerative to the public service company affected thereby, it may order that such rate, toll, rental or charge shall not be changed, altered, abrogated or discontinued, nor shall there be any change in the classification which will change or alter such rate, toll, rental or charge without first obtaining the consent of the commission authorizing such change to be made.

SECTION 10428 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Review.

Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.